

VZCZCXRO6300  
OO RUEHCHI RUEHDT RUEHHM RUEHNH  
DE RUEHPF #0826/01 1660945  
ZNR UUUUU ZZH  
O 150945Z JUN 07  
FM AMEMBASSY PHNOM PENH  
TO RUEHC/SECSTATE WASHDC IMMEDIATE 8579  
INFO RUCNASE/ASEAN MEMBER COLLECTIVE PRIORITY

UNCLAS SECTION 01 OF 04 PHNOM PENH 000826

SIPDIS

SIPDIS  
SENSITIVE

STATE FOR EAP/MLS, DRL AND S/WCI

E.O. 12958: N/A  
TAGS: [PGOV](#) [KJUS](#) [PHUM](#) [CB](#)  
SUBJECT: ECCC PASSES INTERNAL RULES

¶1. (SBU) Summary. On June 12, the judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) approved a set of internal rules governing the court's work. While both the national and international sides of the court hailed the passage of the rules as a major step forward in the court's progress towards the trial phase, some international judges and ECCC staff privately have noted that there may be further obstacles ahead. The prosecution plans to send recommendations forward soon to the investigating judges, and court members believe that a trial could begin in early 2008. The judges also have requested that two of their members be placed in Phnom Penh throughout the proceedings. Meanwhile, the UNDP audit remains a point of contention as donors, UNDP, NGOs and the media continue to debate the significance of the allegations of corruption at the court. End Summary.

#### Internal Rules Passed -----

¶2. (U) At a joint press conference on June 13, representatives of the ECCC announced that the judges and co-prosecutors had passed the court's internal rules that will govern the court's judicial operations over the coming years. While copies of the rules are not yet publicly available, the announcement is considered a major step forward in moving the process forward. ECCC staff who attended some of the deliberations noted that it was clear the Cambodian side was operating under different set of instructions than had been the case during the November 2006 plenary -- the last time all the judges and co-prosecutors met to discuss the internal rules. Another positive step were noticeable points of disagreement among the Cambodian judges -- not on key issues, where all the Cambodian judges held firm -- but on less contentious matters, according to ECCC sources.

¶3. (SBU) One international judge said that the second plenary should have been finished in two days time. Too much time was spent quibbling over translation issues and non-substantive points. The two reserve international judges, Claudia Fenz and Martin Karopkin, were not eligible to vote so used some of their time to visit a Phnom Penh court as well as the Supreme Court, and view the proceedings and conduct of court officials. Karopkin told us that after the assurances the international judges had received from their Cambodian counterparts regarding the judiciary's strong commitment to rule of law and human rights in Cambodia, their brief visits indicated otherwise. They found the reality of Cambodia's poor judicial system a challenge to reform and Karopkin said he understands why Cambodian civil society is skeptical that the ECCC will inspire widespread change in the country's broken judiciary. The U.S. judge nevertheless allowed that their brief snapshot was just that -- a snapshot.

¶4. (SBU) The ECCC announced that the rules would be

available within 10 days, but Co-Investigating Judge Marcel Lemonde indicated that he would try to ensure they were posted earlier (they were not available on the court's website as of June 15). All indications are that the agreed-upon rules do not depart significantly from the earlier version discussed during the March meeting of the expanded drafting committee. Defense Support Section head Rupert Skilbeck issued a separate press release on June 13, praising the passage of the rules but indicating that "certain rules may not fully comply with international standards of fair trial." Reporters seeking clarification from the Defense unit have not received a fuller explanation; one of the ECCC judges told us that Skilbeck was likely laying the groundwork for possible defense arguments and legal objections during the pre-trial stage. Those ECCC members contacted were satisfied that the rules would allow for fair trials; otherwise, they would not have agreed to them. However, some people allowed that the judges could not foresee every potential abuse or loophole, but that a good faith effort to not waver on principle was made.

15. (SBU) Two additional developments took place during the plenary. One was the preview and tour for the judges of the room designated for the pre-trial chamber as well as further discussion on the configuration of the trial courtroom. The pre-trial chamber still requires major work, according to some judges, who were hoping that the chamber would be near completion by the time of the plenary. With the co-prosecutors prepared to begin moving case files to the co-investigating judges, it is anticipated that the pre-trial chamber will begin its work soon. The judges are reportedly unhappy that the main trial chamber (an auditorium) will retain its stage and the judges will be seated there. The judges had earlier objected to being placed on the stage and

PHNOM PENH 00000826 002 OF 004

had wanted it removed. It also remains unclear who will sit where, and whether the defense counsel and the defendant(s) will be seated below the prosecutors and judges. For appearances sake, the international judges had wanted the prosecutors and defense counsel to receive equal treatment. This remains a point of discussion, and one that some international judges fear they may lose. Similarly, there are questions over the robes to be worn by the judges, which reportedly are the same as those of the Cambodian Supreme Court judges. One judge commented that while regal in appearance, he is worried about the symbolism and how that might be interpreted by the Cambodian public. The prosecutors are also to wear the same robes as the judges, which also is worrisome to those international judges concerned about the symbolism -- they had wanted the judges, prosecutors and defense to all be considered separate entities. All sources agree that the dress and the stage/configuration of the court issues are not substantive in nature, but there are concerns that some of these decisions could have a negative impact on the Cambodian public.

16. (SBU) A second issue relates to the notion of having resident judges on the international and national side in Phnom Penh. During the last year, many of the international judges have been unhappy with what they believe was a lack of information from the ECCC administration. To improve information flow during the coming months, the judges discussed and voted to propose to the ECCC administration that one international judge (Japanese judge Motoo Noguchi) and one Cambodian judge (Kong Srim) begin full-time work at the ECCC assisting on judicial matters (although it remains unclear how much authority they would have to speak on behalf of the other judges). There is nothing in the current ECCC budget that would cover these costs so it remains a proposal to the administration.

17. (SBU) UNDP representative Douglas Gardner briefed interested donors June 13 on the UN's plans to handle continued press and NGO pressure to release an internal audit related to the ECCC. Gardner said the audit had not found evidence to conclusively support allegations that Cambodian staff of the tribunal were forced to pay kickbacks. However, it had revealed poor human resource practises which created the potential, or the perception, of wrongdoing. Problems included: staff hired without meeting job requirements, inadequate documentation of applicant pools or hiring criteria, lack of performance evaluations, and ineffective monitoring of salary scales. In short, flaws at the entry-point meant there was neither sufficient transparency nor the right people hired. Therefore, it was not surprising if there were weaknesses, for example in court management.

18. (SBU) Donors (most notably Canada and Australia) strongly objected to UNDP's plan to release "unilaterally" a summary of the audit immediately after the successful plenary session. The Canadian Ambassador said some of the (Malaysian contract) auditors' recommendations, e.g., firing of ECCC staff, were "patently ludicrous" and cast into doubt the seriousness of the audit. She also said that publicly releasing information on what had been billed as a confidential audit would cause the Cambodian side to lose

SIPDIS

confidence in the UN's intentions -- and that releasing something immediately after the hard work of getting to a successful plenary was questionable timing. Other donors generally agreed, although the German, UK, and EC representatives seemed less sanguine that UNDP could continue to avoid NGO and press pressure to answer additional questions about the audit. Donors urged UNDP to work constructively with the Cambodian side to seek agreement on the remedial steps. Then, a summary of the audit could be presented in the much-more positive context of a joint plan to address observed problems. The DCM noted the importance of the ECCC meeting international standards and said human resource problems needed to be rectified, but supported a "joint" approach, if possible.

19. (SBU) Gardner described three main remedial steps, and expressed the opinion that at least some on the Cambodian side supported these steps. He said UNDP's base position was clear: taking a "business as usual" approach was not possible, remedial steps were necessary, and UNDP would need to be more interventionist in the future. Remedial steps were:

-- Requiring that all contract extensions be reviewed, with

PHNOM PENH 00000826 003.2 OF 004

certification that the employee's CV matched the requirements of the job description and that the employee was performing the job satisfactorily. As some 131 staff were on short-term contracts, with most due to expire in June-Sept, this would allow a gradual review of staff and weeding out of those unqualified.

--- Requiring appropriate hiring procedures for new recruits: including evidence that positions were widely advertised, logging all applications, establishing criteria for applicants and documenting the process of short-listing, interviewing, and selection based on merit.

-- Changing the method for calculating salaries of professional-level Cambodian staff. This would affect 35% of the staff, who had been selected into positions where it had been agreed in the RGC-UN MOU that they would be paid 50% of the wage of international staff. Currently, these wages were set against gross (i.e., pre-tax) international levels. But, as the Cambodians were not being taxed, as per a government decision, these wages should be set against the net internal level, which would bring them down somewhere between 12% and

20%.

¶10. (SBU) Gardner also shared a draft of the same statement with the ECCC judges and staff earlier the same day. One international legal advisor, who had read the audit report and who is familiar with the both the deficiencies in the hiring practices as well as the allegations of corruption, objected to any inclusion of the corruption reference in the draft UNDP statement -- which noted that the audit findings did not produce evidence of corruption. He reportedly argued that the terms of reference for the auditors did not specifically focus on corruption; therefore, the auditors did not interview anyone who had asked for a meeting to discuss this issue, and some people who had requested to meet with the auditing team had been refused interviews. Rather, the team focused exclusively on the hiring problems outlined by an earlier auditing team. The advisor noted that it would be misleading to characterize the audit report as having put to rest any suspicion regarding kickbacks or other corrupt practices at the court, when the team had not investigated those allegations. (Note: The issue of corruption remains a contentious point among some ECCC staff and NGOs, with the media continuing to raise questions about the court's handling of this matter. The international judges are aware of the controversy but do not believe it is within their purview to weigh in. End Note.)

First Case to Move Forward?

¶11. (SBU) Most observers speculate that the first case file to move to the co-investigating judges will be that of the head of Tuol Sleng prison -- Khang Khek Ieu (aka Duch), who has been under temporary detention for seven years. The Japanese Embassy has told us that they anticipate Duch will be the first case as it is one with the greatest amount of documentation, witnesses, the suspect has already confessed, and it would be easy to bring it to trial. They also believe that by having an "early success," trying Duch would immediately raise the international profile of the ECCC and help in the GOJ's efforts to lobby other donors for additional funds for the court.

Comment

¶12. (SBU) We have heard very positive comments regarding Co-Prosecutor Robert Petit during the last week and a half, and one judge went so far as to say that if the ECCC succeeds in its overall objectives, it will be due in no small part to Petit. The Canadian co-prosecutor has a strategy and prosecution plan that he has quietly but adamantly maintained he will not allow to be influenced by Cambodian politics. Petit relayed this to the Ambassador early on when the co-prosecutor began his work; it was reinforced again among the international judges during the plenary when discussions about possible RGC interference arose. While everyone is pleased that the internal rules debate is behind them (some judges worry that translation differences between French, English, and Khmer may return to haunt the court), no one is predicting smooth sailing ahead. The next challenge will be the reaction, if any, to the initial case(s) forwarded to the co-investigating judges. Nevertheless, our sources indicate that once the trial phase begins, there is every expectation that the court will take on a life of its own and focus more on the law and its application as opposed to some of the petty bickering that has characterized this most recent

PHNOM PENH 00000826 004.2 OF 004

meeting of judges as well as last year's failed plenary.  
MUSSOMELI